

FEDERAL COURT OF AUSTRALIA

Harchandani v Minister for Immigration and Border Protection [2017] FCA

1395

Appeal from: *Harchandani v Minister for Immigration and Border Protection* [2016] FCCA 3145

File number: NSD 8 of 2017

Judge: **PERRAM J**

Date of judgment: 29 November 2017

Catchwords: **MIGRATION** – appeal from Federal Circuit Court – whether failure by Tribunal to take into account relevant considerations – whether Tribunal committed jurisdictional error by misconstruing and misapplying s 5F(2)(b) of *Migration Act 1958* (Cth)

Legislation: *Migration Act 1958* (Cth) ss 5F, 5F(2)(b), 5F(2)(c), 5F(3) *Migration Regulations 1994* (Cth) rr 1.15A(3)(c)(i), 1.15A(3)(c)(ii), 1.15A(3)(d)(iii), 1.15A(3)(d)(iv), sch 2, cl 820.211(2)(a)

Cases cited: *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5; (2016) 236 FCR 303

Date of hearing: 15 May 2017

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 33

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Solicitor for the First
Respondent:

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ORDERS

NSD 8 of 2017

BETWEEN: **SUNILKUMAR SHANKARDAS HARCHANDANI**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **PERRAM J**

DATE OF ORDER: **29 NOVEMBER 2017**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The Appellant pay the First Respondent's costs.
- 3.
- 4.
- 5.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM J:

1 This is an appeal from the Federal Circuit Court which dismissed the Appellant's application for judicial review of a decision of the former Migration Review Tribunal. That Tribunal determined to be correct an earlier Departmental decision to refuse to grant the Appellant a Partner (Temporary) (Class UK) visa ('a partner visa').

2 The Appellant is an Indian national who arrived from India in Australia on 24 April 2012 on a visitor's visa of 3 months' duration. Before his arrival, he had been communicating with a Ms Ramchandani via email and conversations on Viber. Ms Ramchandani was an Australian resident but she too was an Indian national. The emails which passed between them were romantic in nature. They had been communicating in this way since 10 November 2011, only five months prior to his arrival in Australia.

3 The purpose of the Appellant's visit to Australia was to meet Ms Ramchandani. At the airport he was greeted by his sister and Ms Ramchandani. It appears that his sister had been previously acquainted with Ms Ramchandani and, indeed, it was she who had caused them to be introduced by email in the first place.

4 The Appellant and Ms Ramchandani were engaged only three days later and they were married on 15 June 2012. On 27 June 2012, the Appellant applied for the partner visa. There are many requirements which must be met to be eligible for such a visa. Where the parties are married, one of these is that the couple must be in a 'genuine and continuing relationship' (*Migration Act 1958* (Cth) ('the Act') s 5F(2)(c); *Migration Regulations 1994* (Cth) ('the Regulations') sch 2 cl 820.211 (2)(a)). The purpose of that provision is to discourage emigrants from entering into staged marriages to procure residency.

5 In this case, the Tribunal did not accept the Appellant and Ms Ramchandani were in a genuine relationship and it concluded, inevitably in light of that finding, that he was not eligible for the visa.

Ground One

6 In reaching that conclusion the Tribunal was required by law to take into account certain matters. Relevantly, these included:

- • whether the persons involved represented themselves to other people as being married to each other;
- • the opinion of the persons' friends and acquaintances about the nature of the relationship;
- • the degree of companionship and emotional support that the persons drew from each other; and
- • whether the persons saw the relationship as a long-term one.

(see Act s 5F(3); Regulations rr 1.15A(3)(c)(i), 1.15A(3)(c)(ii), 1.15A(3)(d)(iii) and 1.15A(3)(d)(iv)).

7 7 The Appellant first submitted that the Tribunal had failed to take into account whether the couple represented to other people that they were married because it did not refer to some statutory declarations which were on the Departmental file. The first of these was by a friend of Ms Ramchandani, Ms Maria Tanudjaja. In the part of the declaration dealing with how often she had been in contact with the couple she said only this:

‘I’ve known Usha for over a year. We both work for Otis Elevator Company.

I see her every day at work and through our daily communication, I find her as a sincere and caring person.’

8 8 In my view, this was not evidence about the extent to which the couple represented themselves as being married to each other. Hence, even assuming that a failure to refer to the declaration could, in principle, establish a failure to take into account that matter (a proposition about which I make no comment), this declaration had nothing to do with that topic.

9 9 The other statutory declaration which the Appellant relied upon was by Mr Neal Villena. He said this (relevantly):

‘I believe Usha and Sunil’s marriage is genuine and enduring, *as I have seen, first-hand, that they are in love and truly care for each other*. In addition, after several conversations with Usha and knowing her sincerity, it is clear that marriage for Usha is “for keeps”, endless. Usha and Sunil are committed to commencing their married life together by establishing a home for themselves in Australia.

We, *my family and I*, attended Usha and Sunil’s traditional Indian nuptials/wedding at a temple in Blacktown, NSW. The ceremony was solemn, full of respect for the Indian culture, and, more importantly, the ceremony radiated the couple’s love and devotion towards each other and towards their union of marriage.’

(emphasis added)

10 10 The first emphasised portion does not provide evidence that the couple represented themselves as married to Mr Villena. On the other hand, the second passage does. Mr Villena saw the couple marry and that certainly must have conveyed such a representation to him. In fact, the material before the Tribunal showed that there were quite a few people who were present at the nuptials. It included 241 photographs of the wedding and honeymoon and from these it appears there may have been 15-20 people who attended. Mr Villena was, therefore, not alone.

11 11 I do not think that this aspect of Mr Villena's declaration or the photographs can be entirely discounted in quite the same way that Ms Tanudjaja's can. They do constitute evidence of the couple holding themselves out to others as married, even if only very recently. I do not accept, however, that the Tribunal did not take the material into account. This is because it is evident that the Tribunal was aware of the Departmental file and that it contained statements 'from the parties and others attesting to the relationship' ([24] of its reasons). It was also aware of the fact that there had been a wedding ceremony which had been photographed. At [25] it said this:

'25. Following the hearing the tribunal received various information including the following:

- • Photographs taken during the wedding and at a hotel. The photographs, in conjunction with the marriage certificate show that the parties known [sic] each other and were married on 15 June 2012.
- • Hotel and travel records that the parties spent the night of 15 June 2012 at a hotel in Rooty Hill and evidence that the parties travelled to Melbourne.'
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12 12 So far as this issue is concerned, Mr Villena's evidence went no further in substance than that there had been a wedding which had been attended by a number of people. Given the slight significance of Mr Villena's evidence viewed from that perspective, I can see no reason why I would not read the reference in [24] to be sufficient to indicate that it was taken into account. Nor can it be accepted, in light of [25], that the photographs were not taken into account in assessing this aspect of the matter.

13 13 Insofar as the Appellant's case is based on an alleged failure to take into account the opinion of friends about the nature of the relationship, this was based again on the statements

of Ms Tanudjaja and Mr Villena. As I have explained already, this material was taken into account.

14 14 The learned primary judge reasoned in this manner at [75] of the reasons of the Federal Circuit Court and, for the reasons I have just given, was correct to do so.

15 15 Next it was said that the Tribunal had not taken into account the degree of companionship and emotional support the couple gave each other (the third matter above at [6]). So far as this concerns what can be gleaned from the wedding ceremony itself, it is to be rejected for the reasons just given.

16 16 Insofar as it goes beyond that, I do not think Ms Tanudjaja's declaration says anything about this topic at all. The closest it comes is as follows:

‘I believe the relationship is genuine. Usha believes in the commitment of marriage & she's not one who takes it for granted.

I attended their Indian tradition marriage ceremony at Blacktown Temple. It was attended by close family & friends.

Both Usha & Sunil plan to start their married life in Australia.’

17 17 But this does not really speak to the topic. Nor do I think Mr Villena's statement at [9] above helps much in this regard. That passage certainly shows that Mr Villena thought the couple in love but that is quite a different proposition.

18 18 Then it was submitted that the Tribunal had not taken into account whether the couple saw the relationship as long term. Again, I do not think that Ms Tanudjaja's evidence is of any assistance in this regard. However, the passages set out above from Mr Villena's declaration certainly are. He says that after several conversations with Ms Ramchandani ‘and knowing her sincerity, it is clear that marriage for Usha is “for keeps”, endless’. In addition to this material, there were also the 241 photographs of the wedding and honeymoon. I do not think, however, that the photographs advance the proposition that the relationship was seen by the couple as long term beyond the simple fact of their getting married, a fact of which the Tribunal was already plainly apprised.

19 19 For the reasons I have already given, however, I accept that the Tribunal was aware of Mr Villena's declaration. It was also aware, as its reasons at [23] show, that it was required to consider the ‘parties’ commitment to each other’. Indeed the Tribunal in reaching its conclusion said (at [33]) that it had taken into account ‘the provided material, such as the

photographs, that at [sic] prima facie level supports the existence of a relationship'. Nevertheless, it went on to find that the relationship was not genuine. I do not think that it can be said that the Tribunal did not take Mr Villena's evidence into account.

20 20 It was also submitted that each of the four matters set out above which were required to be taken into account could also be seen as not having been taken into account because of the Tribunal's failure to deal with the emails that had passed between the couple before the Appellant's arrival in Australia.

21 21 These emails were contained within the Departmental file as attachments to the Appellant's original visa application. There were a number of these emails. There is no need to set them out. The general tone was, as I have already noted, romantic. It is, I think, clear that the Tribunal was well aware of this material. For example, at [31], it said that it was apparent that the couple knew each other even before his arrival 'through their email communication'. But in any event, the emails could not have assisted in making good the Appellant's point. That point, it will be recalled, was to show that the Appellant was Ms Ramchandani's spouse. These emails predated the marriage. They could not have showed, for example, that the couple had held themselves out as married (they had not yet met each other, still less others). They show, in fact, that the couple were not married.

22 22 Given that the Tribunal expressly adverted to the material, it is difficult to see how the emails took the matter any further. I apprehend no error by the Tribunal or the primary judge.

23 23 All of the above matters compendiously constituted ground one of the appeal which I would dismiss.

Ground Two

24 24 Ground Two involved a contention that the Tribunal had failed to take account, *inter alia*, of the declarations of Ms Tanudjaja and Mr Villena. For the reasons I have already given, this contention cannot be accepted. It was then said that the Tribunal had failed to take account of Ms Ramchandani's emails to the Appellant prior to his arrival which I also reject for the reasons just given.

25 25 It was also submitted that it failed to take account of her statement of 27 June 2012. This statement was provided by the Appellant when he lodged his visa application. It is, I think, reasonably clear that the Tribunal was aware of the statement. It was on the Departmental file and, as [24] shows (above at [11]), the Tribunal said in terms, 'There are

statements from the parties and others attesting to the relationship'. I would read the reference to the 'parties' as being to the Appellant and Ms Ramchandani.

26 26 The real difficulty with Ms Ramchandani's statement was not that the Tribunal was not aware of it. It was that by the time of the hearing before the Tribunal the couple had split up and Ms Ramchandani had withdrawn her support for the application. Consequently, the Tribunal did not hear from her. In any event, I do not accept that the statement was not taken into account. The primary judge rejected this argument at [80] of her reasons. Although my reasons for doing so are slightly different, her Honour's conclusion was correct.

Grounds Three and Four

27 27 The third and fourth grounds involved an argument that the Tribunal had misconstrued and misapplied s 5F(2)(b) of the Act. Section 5F provides:

'5F Spouse

- (1) For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a **married relationship** if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.'

28 28 Maintaining one's focus on s 5F(2)(b), the Tribunal said this at [32]:

- '32. The tribunal is unable to be satisfied that a genuine spousal relationship ever existed between Mr Harchandani and Ms Ramchandani. The evidence suggests that Ms Ramchandani was expecting an undisclosed amount of money or at least financial support. It is not clear whether or not Ms Ramchandani's expectation of financial gain was due to prior promises. The tribunal is not required to find alternate scenarios as to why Ms Ramchandani

married Mr Harchandani. The point is that it seems to the tribunal that Ms Ramchandani was not committed [sic] the relationship. She terminated the relationship following Mr Harchandani's admission to hospital for self-harm. The tribunal infers, based on the provided evidence that Mr Harchandani's failure to provide any money was also a factor in the break up [sic] the relationship.'

29 29 The argument was as follows: people who are married may be mutually committed to each other for more than one reason. Love may be involved but pragmatic considerations may intrude too; the passion of new love may have subsided, at length, into mutual convenience; the fires may have gone out but the parties may think themselves unlikely to do any better and so on. The Full Court of this Court, not known for its pronouncements on love, has indeed held this to be so. In *Minister for Immigration and Border Protection v Angkawijaya* [2016] FCAFC 5; (2016) 236 FCR 303 the Court had to consider whether the absence of love and affection in a relationship necessarily meant there was no relationship for the purposes of a provision not materially different to s 5F. It concluded that this was not the case: 304 [3] per Allsop CJ, 317 [53] per Kenny and Griffiths JJ. Although love and affection were relevant to the inquiry, they were not determinative.

30 30 The next step was to observe that s 5F(2) did not require the identification of the source of mutual commitment to which it referred.

31 31 It was then said, correctly, that Ms Ramchandani's motivation was that she expected financial support or money from which the Tribunal concluded that the relationship, at least from her perspective, was not genuine. Consequently, 'the Tribunal was required... to consider what other motives may have been involved...'. This does not follow. Section 5F does not require the finding of any motives. Motives may be examined, of course. But neither 'motives' nor 'other motives' are mandatory considerations. Section 5F required no such analysis.

32 32 I therefore reject grounds three and four.

Result

33 33 It follows from the above that the appeal should be dismissed with costs.

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I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 29 November 2017